

*United States Court of Appeals
for the Second Circuit*



**BRIEF FOR
APPELLANT**

ORIGINAI 76-7477

United States Court of Appeals
FOR THE SECOND CIRCUIT

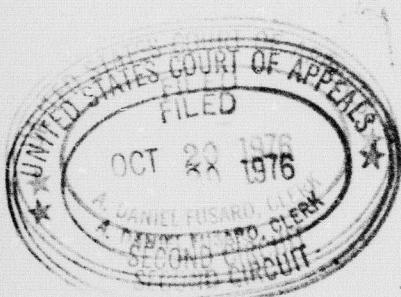
CLARENCE O. GOKAY, JR., an infant by his mother
DOROTHY GOKAY, individually,

Plaintiff-Appellant,
against

MARC ANTHONY'S, INC. d/b/a MARC ANTONIO'S
RESTAURANT,
Defendant-Appellee.

On Appeal from the United States District Court
for the Southern District of New York

PLAINTIFF-APPELLANT'S BRIEF



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Preliminary Statement

This is an appeal from an order of Judge William C. Conner dated August 27, 1976 granting defendant's motion "... to approve nunc pro tunc the filing of its notice of appeal on July 14, 1976 . . .".

The Facts

The judgment in this action was entered on *June 11, 1976* with the defendant filing its notice of appeal on *July 14, 1976* (3a).

On July 2, 1976 the notice of appeal was prepared and instructions given to someone by the managing partner to file it with the District Court prior to July 11, 1976 (5a, 6a).

The managing partner for the firm representing the defendant, who does not deny having knowledge of the entry of the judgment on June 11, 1976, indicates that he first discovered on July 13, 1976 that the notice of appeal was not filed with the Clerk of the United States District Court, Southern District of New York (3a, 6a).

The reasons given for the late filing was that after the preparation of the notice of appeal on July 2, 1976 and instructions given for its filing, it was not filed but was apparently packed in a carton of files to be moved within the building. It was after the move that he discovered the notice of appeal on July 13, 1976 (5a-6a).

On August 19, 1976 a pre-argument conference was held before Nathaniel Fensterstock (10a-11a). Defendant contends that this was the first time they were aware that the notice of appeal was not filed on time (4a).

It was not until August 25, 1976, that a notice of motion was filed requesting an order approving the nunc pro tunc filing of the defendant's notice of appeal (2a).

POINT I

Defendant failed to show sufficient "excusable neglect" for the late filing of its notice of appeal.

Rule 4 of the Federal Rules of Civil Procedure provides in part that:

"Upon a showing of excusable neglect, the district court may extend the time for filing the notice of appeal by any party for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision. Such an extension may be granted before or after the time otherwise prescribed by this subdivision has expired; but if a request for an extension is made after such time has expired, it shall be made by motion with such notice as the court shall deem appropriate."

Although this Court has in the past permitted the filing of a late notice of appeal *nunc pro tunc*, *Stirling v. Chemical Bank*, 511 F.2d 1030 (2nd Cir. 1975) there is still the statutory requirement of a sufficient "excusable neglect" explanation.

The explanation of "excusable neglect" is in this case somewhat sketchy. We are told that a Notice of Appeal was prepared by an attorney on July 2, 1976 and that someone was instructed to file it in the District Court prior to July 11, 1976. We are not told who the person was who was instructed to file the Notice of Appeal and why that person did not file the Notice of Appeal but elected to put it back into the file.

There is also no explanation why, having discovered on July 13, 1976 that the Notice of Appeal was being filed late, that no motion was made at that time by any of the attorneys handling the case and the appeal.

A reading of the Advisory Committee's note to the 1966 amendments to former Rule 73A indicates that "no reason other than failure to learn of the entry of judgment should ordinarily excuse a party" (see Moore's Federal Practice, Volume 9, Section 203.25[3], pp. 782-783).

It is obvious that the defendant herein was aware of the entry and date of entry of the judgment.

Although the Advisory Committee note also speaks of "extraordinary cases wherein injustice would otherwise result" the excuse given in the case at bar does not fall within the intent of the legislation (see Moore's Federal Practice, Volume 9, Section 204.13[1], pp. 973-974).

In addition although defendant indicates that it discovered its law office failure with respect to the Notice of Appeal on July 13, 1976, he did not move to file a late Notice of Appeal until after the conference with Mr. Fensterstock and until August 25, 1976.

The law office failure for which we have not received a complete explanation with respect to the defendant's failure to file the Notice of Appeal prior to July 11, 1976 and the unexplained law office failure in not moving prior to the 60 days from the entry of the judgment mandated the denial of defendant's motion to file its Notice of Appeal *nunc pro tunc*.

CONCLUSION

**The order appealed from should be reversed and
the appeal from the judgment entered June 11, 1976
be dismissed both on the law and the facts.**

Respectfully submitted,

LIPSIG, NAPOLI, SULLIVAN, MOLLEN &
LIAPAKIS, P. C.

Attorneys for Plaintiff-Appellant

JOSEPH P. NAPOLI
Of Counsel

Service of three (3) copies of
the within BRIEF is
hereby admitted this 20th day
of October , 1976

Bower & Gardner
Attorney for Defendant Appellee

by Saff Neum P.C.